14

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Southwestern Bell Mobile Systems, Inc.	)	
Petition for a Declaratory Ruling Regarding the	)	File No. 97-31
Just and Reasonable Nature of, and State Law	)	DA 97-2464
Challenges to, Rates Charged by CMRS Providers	)	
When Charging for Incoming Calls and Charging	)	
for Calls in Whole-Minute Increments	)	

COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

The Personal Communications Industry Association ("PCIA"),[1] hereby respectfully submits its comments in response to the *Public Notice* in the above-captioned proceeding.[2] As described in greater detail below, PCIA agrees with Southwestern Bell Mobile Systems, Inc.

---

[1] PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's Federation of Councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Site Owners and Managers Association, the Association of Wireless Communications Engineers and Technicians, the Private Systems Users Alliance, and the Mobile Wireless Communications Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

[2] FCC Public Notice, *Public Comment Invited, Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, DA 97-2464 (rel. Nov. 24, 1997) ("*Public Notice*"). By *Order*, DA 97-2674 (rel. Dec. 22, 1997), the date for filing opening comments was extended to January 7, 1998.

("SBMS") that the Commission should ensure that pricing and billing commercial mobile services remain subject to a uniform federal regulatory framework, rather than a patchwork of inconsistent state dictates.

I. INTRODUCTION

On November 12, 1997, SBMS filed a Petition for Declaratory Ruling ("*Petition*") requesting that the Commission declare, *inter alia*, that: (1) in the context of Section 332(c)(3) of the Communications Act of 1934, as amended ("Communications Act"), the phrase "rates charged" refers to all rates — including whole minute rates — for all mobile services — including the delivery of both landline and mobile originated calls to mobile units; (2) Section 332(c)(3) preempts state regulation of the "rates charged" by commercial mobile radio service ("CMRS") providers for their mobile services; and (3) state judicial orders that either directly or indirectly regulate the rates charged by CMRS providers are prohibited by Section 332(c)(3) because they threaten the uniform, nationwide system of regulation contemplated by this statutory section. SBMS accordingly requested that the Commission declare that state courts are jurisdictionally barred from granting any relief in suits against CMRS providers that would have the effect of regulating the rates charged by these providers. PCIA joins SBMS in its preemption analysis and requests that the Commission grant the relief sought in the *Petition*.

II. BECAUSE SECTION 332(c) GIVES THE COMMISSION PLENARY JURISDICTION OVER ALL RATES CHARGED BY COMMERCIAL MOBILE PROVIDERS FOR ALL MOBILE SERVICES, SBMS'S PETITION SHOULD BE GRANTED

Section 332(c)(3) states in pertinent part that "no State or local government shall have *any* authority to regulate the ... rates charged by any commercial mobile service [provider] ...."[3] In its *Petition*, SBMS correctly points out that, in the context of this statutory section, the phrase "rates charged" must include whichever mobile services for which the CMRS provider chooses to charge, and how much it decides to charge for these services.[4] As specifically applied to the delivery of either landline or mobile originated calls to mobile units, such an interpretation is consistent with the plain language of the Communications Act and its legislative history.

Section 3 of the Communications Act defines a "mobile service" broadly as "radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves ...."[5] Section 332(d)(1) goes on to define "commercial mobile service" as "any mobile service ... that is provided for profit and makes interconnected service available (A) to the public, or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public ...."[6]

Thus, the delivery of incoming landline *or* mobile originated calls to mobile units clearly falls within these definitions. First, incoming calls represent radio communication between

---

[3] 47 U.S.C. § 332(c)(3) (emphasis added).

[4] *See Petition* at 14.

[5] 47 U.S.C. § 153(27).

[6] 47 U.S.C. § 332(d)(1).

mobile stations and land stations. Second, the routing and termination of land-to-mobile and mobile-to-mobile calls is a service that is provided for profit and offered to the public. Finally, delivering calls to mobile units relies extensively on interconnected services for both call completion and the exchange of customer data.

Further, states cannot regulate the rates charged for mobile services,[7] whether these rates are expressed in whole-minute or partial-minute increments. The legislative history of Section 332(c)(3) clarifies that "state or local governments cannot impose rate ... regulation on" CMRS providers.[8] While states and localities can regulate "other terms and conditions" of commercial mobile service, this phrase is meant to encompass matters such as "customer billing information and practices and billing disputes and other consumer protection matters."[9] Thus, the rates charged for commercial mobile services, regardless of how they are expressed, are clearly *rates* and not billing practices. As such, these rates are beyond the ambit of state regulation.

Against this statutory background, state courts plainly cannot issue orders that either directly or indirectly regulate the rates charged for commercial mobile services. State courts are creatures of state governments,[10] and as such must abide by Congress's admonition that no state

---

[7] Section 332(c)(3)(A) provides an exception to this bar, whereby a state may petition the Commission for authority to regulate CMRS rates if it can make the statutorily required showing. To date, no state has made the requisite demonstration, and therefore no state may regulate CMRS rates.

[8] H.R. Rep. No. 103-111, at 261 (1993) ("Committee Report").

[9] *Id.*

[10] *See Comcast Cellular Telecom. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996) ("judicial action constitutes a form of state regulation").

government shall regulate the "rates charged" by CMRS providers.[11] Further, as SBMS correctly details, state court orders will constitute rate regulation if they either award damages to aggrieved customers[12] or make a judicial determination of what constitutes a "reasonable" rate.[13] Because such state court decisions are in fact rate regulation, they are flatly prohibited by Section 332(c)(3).

Finally, allowing the provision of CMRS to be governed by a series of *ad hoc* state judicial decisions is demonstrably at odds with Congress's intent as expressed by Section 332(c)(3). Specifically, in enacting this section, Congress also passed a conforming amendment to the Commission's jurisdictional statute — Section 2(b) — to give the Commission explicit regulatory authority over the rates charged by CMRS providers for both interstate and intrastate services.[14] The legislative history makes it clear that Congress revised Section 332(c) in order to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[15] The creation of such a federal regulatory framework was intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state

---

[11] *See* 47 U.S.C. § 332(c)(3).

[12] *See Petition* at 18-19 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Hardy v. Claircom Communications Group*, 937 P.2d 1128, 1132 (Wash. Ct. App. 1997); *Comcast*, 949 F. Supp. at 1204; *Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1171 (S.D.N.Y. 1996)).

[13] *See Petition* at 21 (citing *Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1121-22 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 17, 21 (2d Cir. 1994)).

[14] *See* 47 U.S.C. § 152(b).

[15] H.R. Rep. 103-213, at 490 (1993) ("Conference Report").

lines as an integral part of the national telecommunications infrastructure ...."[16] Thus, allowing state courts to establish the rates for any commercial mobile service is directly contrary to the express mandate of Congress.

III. CONCLUSION

For the foregoing reasons, the Commission should grant the relief requested by SBMS and rule that state judicial enactments directly or indirectly challenging any of the "rates charged" by CMRS providers for any mobile service are jurisdictionally barred by Section 332(c)(3). Such a determination is required by the express intent of Congress in establishing a federal regulatory framework to govern the provision of CMRS.

Respectfully submitted,

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

By: Mark J. Golden

Mark J. Golden
Senior Vice-President, Government Relations
Angela E. Giancarlo, Esq.
Government Relations Manager
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

(703) 739-0300

By: Katherine M. Harris

Katherine M. Harris
Stephen J. Rosen
WILEY, REIN & FIELDING
1776 K Street, NW
Washington, DC 20006

(202) 429-7000

Its Attorneys

January 7, 1998

---

[16] Committee Report at 260.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1998, I caused copies of the foregoing Comments of The Personal Communications Industry Association to be mailed via first-class postage prepaid mail to the following:

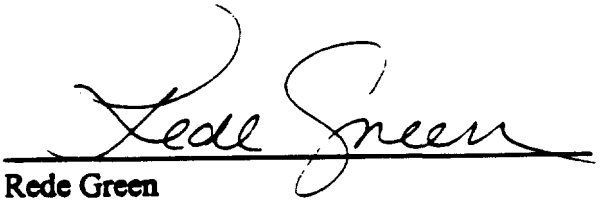
*Yanic Thomas
Policy & Rules Branch
Federal Communications Commission
Wireless Telecommunications Bureau
Commercial Wireless Division
2100 M Street, N.W., Seventh Floor
Washington, D.C. 20554

Carol M. Tacker
Vice President, General Counsel & Secretary
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.
17330 Preston Road, Suite 100A
Dallas, Texas 75252

Patrick J. Grant
ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Marcus E. Cohn, P.C.
PEABODY & BROWN
101 Federal Street
Boston, Mass. 02110-1832

*ITS
1231 20th Street, N.W.
Washington, D.C. 20036



Rede Green

*Via Hand Delivery